

JAN 30 1992

No. 91-542

OFFICE OF THE CLERK

In The
Supreme Court of the United States
October Term, 1991

ELLIS B. WRIGHT, JR., WARDEN, et al.,

Petitioners,

v.

FRANK ROBERT WEST, JR.,

Respondent.

**On Writ Of Certiorari To The United States Court Of
Appeals For The Fourth Circuit**

JOINT APPENDIX

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**Petition For Certiorari Filed September 26, 1991
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RELEVANT DOCKET ENTRIES

United States District Court for the Eastern District of Virginia (88-0412)

- 6/21/88 Petition for a Writ of Habeas Corpus
- 8/4/88 Respondents' Motion to Dismiss
- 8/4/88 Respondents' Brief in Support of Motion to Dismiss
- 9/21/88 Petitioner's Traverse to Motion to Dismiss and Memorandum of Law in Support of Traverse with attachments
- 6/1/89 Memorandum of Court
- 6/1/89 ORDER that for the reasons set forth in the accompanying memorandum, respondents' motion for summary judgment is GRANTED; petitioner's petition is DISMISSED
- 6/9/89 Petitioner's Notice of Appeal

United States Court of Appeals for the Fourth Circuit (89-6686)

- 6/20/89 Prisoner case docketed
- 6/21/89 Record on appeal filed
- 2/1/90 Clerk order filed appointing Steven H. Goldblatt as counsel for Appellant Frank Robert West
- 4/20/90 Brief and joint appendix filed by Appellant
- 6/7/90 Brief filed by Appellee
- 6/22/90 Reply brief filed by Appellant Frank West
- 7/18/90 Oral argument heard

8/2/90 COURT ORDER filed requesting supplemental memorandum from Appellant Frank Robert West on or before 08/17/90; Appellees file supplemental memorandum within 10 days after service of appellant's memorandum

8/17/90 Supplemental memorandum filed by Appellant Frank Robert West

8/28/90 Supplemental memorandum along with an attachment filed by Appellee

4/29/91 Published authored opinion filed

4/29/91 Judgment order filed

5/10/91 Petition filed by Appellee for rehearing

6/5/91 Response to motion for rehearing motion for suggestion of rehearing in banc filed by Appellant

7/2/91 COURT ORDER denying motion for rehearing, denying motion for suggestion for rehearing in banc

7/3/91 Motion filed by Appellee to amend order

7/3/91 Motion filed by Appellee to stay the mandate

7/8/91 Corrected order filed granting motion to amend order and denying petition for rehearing and suggestion for rehearing in banc

7/9/91 COURT ORDER filed granting motion to stay mandate

COMMONWEALTH OF VIRGINIA)
) TO-WIT:
COUNTY OF WESTMORELAND)

In the Circuit Court of Westmoreland County, January Term, 1979.

The Grand Jurors of the Commonwealth of Virginia, in and for the body of the County of Westmoreland, now attending the Circuit Court of the said County, upon their oath, present that FRANK ROBERT WEST, JR., on or about the 13th day of December, in the year of one thousand nine hundred and seventy-eight, and in the said County, did feloniously (1) break and enter the dwelling house of Angelo F. Cordova, with the intent to commit larceny therein, in violation of Section 18.2-91 and (2) take, steal and carry away the property of Angelo F. Cordova having a value of \$100 or more, in violation of Section 18.2-95 of the Code of Virginia of 1950, as amended, against the peace and dignity of the Commonwealth of Virginia.

Upon the evidence of

C. W. Jackson

witness sworn in open Court and sent to the grand jury to give evidence.

VIRGINIA:

IN THE CIRCUIT COURT OF
WESTMORELAND COUNTY

COMMONWEALTH OF VIRGINIA

vs.

FRANK ROBERT WEST, JR.

Complete transcript of the testimony and other incidents in the above, when heard on June 21, 1979, before Honorable Dixon L. Foster, Judge, and a jury.

APPEARANCES:

Robert B. Fox, Esquire,
Montross, Virginia,
Commonwealth's Attorney for the County of Westmoreland;

Michael C. Mayo, Esquire,
Colonial Beach, Virginia,
Counsel for the Defendant;

The Defendant, Frank Robert West, Jr., in person.

* * *

[p. 10] THE COURT: I ask the Clerk to arraign the defendant.

MR. FOX: If it please the Court, there were two counts in the indictment, and the Commonwealth only intends to proceed on one of those counts.

THE COURT: All right, sir.

THE CLERK: Are you Frank Robert West, Jr.?

THE DEFENDANT: Yes.

THE CLERK: Mr. West, you stand indicted for the following crime: Commonwealth of Virginia, County of Westmoreland, in the Circuit Court of Westmoreland County, January term, 1979. The grand [p. 11] jurors of the Commonwealth of Virginia, in and for the body of the County of Westmoreland, now attending the Circuit Court of the said County, upon their oath, present that Frank Robert West, Jr., on or about the 13th day of December, in the year of one thousand, nine hundred and seventy-eight and in the said County, did feloniously take, steal and carry away the property of Angelo F. Cardova, having a value of \$100.00 or more, in violation of Section 18.2-95 of the Code of Virginia of 1950, as amended, against the peace and dignity of the Commonwealth of Virginia.

How say you, guilty or not guilty?

THE DEFENDANT: Not guilty.

* * *

* * *

[p. 24] ANGELO F. CARDOVA, a witness called by the Commonwealth, having been duly sworn, testifies as follows:

DIRECT EXAMINATION

BY MR. FOX:

Q Mr. Cardova, would you state your name, residence and occupation?

A My name is Angelo F. Cardova; I live at 3320 Franmore Drive, Falls Church, Virginia; I am a Government employee and an accountant by profession.

Q Mr. Cardova, do you own any real estate in Westmoreland County?

A Yes, sir.

Q Would you be kind enough to tell the jury where it is located?

A I own a house in a lot located at Cabin Point. It is on Section I, Lot Number 37.

Q Mr. Cardova, were you at your home in [p. 25] Westmoreland County on December 13, 1978?

A Yes, sir.

Q And when was the next time that you were at your home?

A December 26.

Q Would you be kind enough to tell the jury what, if anything, you discovered unusual at your home?

A I went to my house on the morning of December 26, and upon entering my house, I noticed some of my personal belongings were missing; the coffee table, the bar, the mirror, and several other items.

Q Did you subsequently determine that your house had been entered?

A Yes, I concluded that very instant that there had been a break-in, because all of the things were missing. I called the Sheriff's office to report it.

Q When you left your home on December 13, 1978, had you closed the house up?

A Yes, sir. I thought the house was secured before I left.

Q Had you authorized anyone to enter your home?

A No, sir.

Q Had you authorized anyone to remove any of your property?

[p. 26] A No, sir.

Q Mr. Cardova, did you make out or cause to be made out a list of the items that were stolen?

A Yes, sir.

Q Can you generally tell the jury the nature of the items that were stolen?

A I noted two television sets, a bar, some groceries. I prepared the list with my -

Q We will get to that in a second. Were you able to determine the value of the items that were missing?

A Yes, sir.

Q And what was that value, sir?

A The aggregate of all the items that were missing was \$3,500.00.

Q Did there come a time subsequent to December 27, 1978, when you had occasion to examine an inventory of the items in the presence of Sheriff Jackson? Did you come to Westmoreland County in an attempt to find any of the items that were taken?

A I met Sheriff Jackson around January. I am not sure about what date in January, maybe January 22, but I went to his office to identify the items that were recovered.

Q Were you able to identify any of the items that he had as yours?

A I would say I was able to identify [p. 27] definitely those items that I have proof. For example, I have a television set that I know the serial number of, the sleeping bag of my son has a name tag, the decorations in my living room which came from the Philippines, were specially made for me. I identified those

Q Under those circumstances, Mr. Cardova, I will show you some photographs, and ask you whether or not you are able to identify the items in the photographs.

THE COURT: Has counsel seen them?

MR. MAYO: I have seen them, Your Honor.

If Your Honor please, I would like to ask the Commonwealth if he is going to have these identified, I would like to have them marked as Exhibits at this time for identification.

MR. FOX: We will be happy to, but I certainly would like the Court's indulgence to present my own evidence.

THE COURT: It might be easier if you are going to identify something from the pictures to have them marked for identification. You may go ahead, and I will mark them.

BY MR. FOX: (Continuing)

Q I show you a picture and ask you whether or not you can identify the items in that picture.

A They are my personal property.

[p. 28] Q Can you tell the jury what those items are and what their value is, please.

MR. MAYO: I do not believe the items have been offered as evidence. I do not believe it is proper to show to the jury.

THE COURT: I think it is proper. You can continue, Mr. Fox.

BY MR. FOX: (Continuing)

Q Will you be kind enough to tell the jury what those items are and their value.

A This is a mirror. This was property brought by my daughter from Manila in October, and I had it brought to my house in October. It was one of those items that was missing, and it is worth \$30.00.

This pair of shoes fits me; that is my size.

These wood carvings are all from the Philippines.

Q Will you tell the jury their value?

A The value is \$60.00.

MR. FOX: I ask this to be marked for identification as Commonwealth Exhibit No. 1.

THE COURT: That will be marked as Commonwealth Exhibit No. 1.

BY MR. FOX: (Continuing)

Q Mr. Cardova, can you identify the item in [p. 29] this picture?

A This is an enlarged picture of the mirror and these are the wood carvings. The value of this is \$30.00, and this is \$60.00.

MR. FOX: Your Honor, please mark these as Commonwealth Exhibit No. 2.

THE COURT: That will be marked as Commonwealth Exhibit No. 2.

BY MR. FOX (Continuing)

Q Can you identify the item shown in that photograph?

A This is the coffee table that I bought from Levitz Furniture in Maryland in November, and this is a ball made of hard wood. It is a carving.

The coffee table is \$35.00, because I bought it during a sale, and that ball is around \$10.00.

MR. FOX: Please mark this as Commonwealth Exhibit No. 3.

THE COURT: Commonwealth Exhibit No. 3.

BY MR. FOX: (Continuing)

Q I show you two pictures at the same time, and ask you to identify that item for the jury.

A This is a mink coat that belongs to my wife, and that is a picture of the mink and the name of my wife is embroidered there, Esther.

[p. 30] MR. FOX: Your Honor, please mark the two pictures of the interior and exterior of the mink coat as Commonwealth Exhibit No. 4.

THE COURT: These together are Commonwealth Exhibit No. 4.

BY MR. FOX: (Continuing)

Q Mr. Cardova, are you able to identify that item? Excuse me - can you tell the jury the value of the coat?

A The value of the coat is \$35.00.

THE COURT: \$35.00?

THE WITNESS: Yes, sir.

A (Continuing) This is some flatware sitting in a box, and my wife bought this a year or two ago. We paid \$28.00 for this set.

MR. FOX: Please mark as Commonwealth Exhibit No. 5.

THE COURT: Commonwealth Exhibit No. 5.

BY MR. FOX: (Continuing)

Q Are you able to identify this item in this photograph?

A This picture is a lobster that was caught in the China Sea and mounted. It is mounted on a basket, and it

was hand carried to me in October by my daughter. The value of this is \$30.00

[p. 31] MR. FOX: Please mark as Commonwealth Exhibit No. 6.

THE COURT: Commonwealth Exhibit No. 6.

BY MR. FOX: (Continuing)

Q Can you identify the item shown in this photograph, Mr. Cardova?

A This picture is a silk jacket with the engraving saying "Korea 1970." My son-in-law was assigned to Korea, and he brought this to me as a gift. The value is around \$15.00.

MR. FOX: Commonwealth Exhibit No. 7.

THE COURT: This exhibit will be Commonwealth Exhibit No. 7.

BY MR. FOX: (Continuing)

Q Please identify this photograph, Mr. Cardova.

A This is the bar that I noticed right away was missing in my house when I walked in. My son-in-law brought this from Marlowe, Maryland, and this is the television set, a small television set, which I own. There is a record player beside it.

The value of the bar is around \$80.00, the T.V. is worth around \$65.00, and the record player, I would say, is around \$25.00.

MR. FOX: Please mark as Commonwealth [p. 32] Exhibit No. 8.

THE COURT: That will be Exhibit No. 8.

BY MR. FOX: (Continuing)

Q Mr. Cardova, here is one final picture.

A This is the television set, the Sony television set. I paid \$365.00 for this set, and I still have the receipt for this one.

Q Are there any special markings on this set to distinguish it from other sets of the same manufacturer?

A Well, the best evidence to prove that is the serial number, the serial number on the T.V. set. I have receipts to prove that it is mine.

MR. FOX: Commonwealth Exhibit No. 9.

THE COURT: That will be Commonwealth Exhibit No. 9.

MR. MAYO: May we approach the bench for a moment?

THE COURT: Yes, sir.

NOTE: At this point, the Court and counsel are conferring, out of the hearing of the jury, whereupon the hearing is resumed, viz:

THE COURT: You can continue, Mr. Fox.

BY MR. FOX: (Continuing)

Q Mr. Cardova, can you tell the jury the value of the items which have been recovered?

[p. 33] A The value of all of the items that I was able to recover was around \$1,100.00.

Q \$1,100.00?

A Yes.

MR. FOX: Would you be kind enough to answer Mr. Mayo's questions.

CROSS EXAMINATION
BY MR. MAYO:

Q Mr. Cardova, you are from Falls Church, Virginia?

A Yes, sir.

Q And you are an accountant, sir?

A Yes, sir.

Q When were you last in your cottage? It is a seasonal cottage at Cabin Point?

A It is our seasonal house.

Q Where do you work?

A In Washington, D.C.

Q Is the house in Cabin Point used for vacation purposes?

A Not exactly. We spend every weekend in that house.

Q Do you use that house on your days off?

A Yes, sir.

Q Do you consider yourself living in or [p. 34] residing at that place in Cabin Point?

A Yes.

Q And do you consider yourself also residing in Falls Church, Virginia?

A Yes, sir.

Q You were at your home on December 13, 1978, according to your testimony?

A Yes, sir.

Q When did you leave that day, sir?

A On December 13?

Q Yes, sir.

A I left my house around 5:30 in the afternoon.

Q And who was with you when you left?

A I was by myself.

Q By yourself?

A Yes, sir.

Q Are you married, sir?

A Yes.

Q Do you have a family?

A Yes, sir.

Q They were not with you on that day?

A No, sir.

Q I see. And at that time you say you secured the house?

[p. 35] A Yes, sir.

Q When did you next return?

A I returned on December 26.

Q And what time of day was that?

A Around 11:30 in the morning. My family was with me.

Q On that occasion?

A On that day.

Q Is Mrs. Cardova here today, sir?

A Yes, sir.

Q And your son is here today?

A No.

Q Mr. Cardova, do I understand you to say that the items that you found missing when you returned on December 26 had a total value of \$3,500.00?

A Yes, sir.

Q And it is my further understanding of your testimony that the items recovered were valued at \$1,100.00?

A Correct.

Q And some items were not accounted for; is that correct?

A Right.

MR. MAYO: I have no further questions, Your Honor.

THE COURT: You can step down, Mr. Cardova.

* * *

* * *

[p. 36] C. W. JACKSON, a witness called by the Commonwealth, having been duly sworn, testifies as follows:

DIRECT EXAMINATION

BY MR. FOX:

Q Good morning, Sheriff Jackson. Will you be kind enough to identify yourself.

A Sheriff C. W. Jackson, Westmoreland County.

Q And you were the Sheriff on January 10 of 1979?

A Yes, sir, I was.

Q Did you have occasion on that date to go to Gloucester County to the home of Frank West?

A Yes, I did.

Q And for what purpose did you go there?

A I went to the home to make a search of the [p. 37] premises.

Q Would you be kind enough to tell the jury what happened when you arrived at the home?

A When we arrived at the home, I had to go through a gate there and the gate, as I recall, was locked.

There was a vehicle sitting inside the gate, and there was a fence surrounding the yard.

One of the officers that was with me observed movement of a curtain or something inside the house. Anyway, they came up and advised me that they observed movement in the house, and I told them to find out who was in the house at this time.

Several of the officers jumped over the fence and went to the door. Mrs. West, Nadine West, the wife of the defendant, answered the door, and invited them on in. I followed a few minutes later. She consented to a search of the premises at that time.

Q Did you undertake a search after receiving consent?

A Yes, sir, we did.

Q What, if anything, did you find there and what did you do with the items?

A We found numerous items that we could identify by reports of the items that were stolen in Westmoreland County. We rented a U-Haul van later on in the day, [p. 38] and we loaded the items up.

[p. 57] MR. MAYO: If Your Honor please, I would like to make a motion to strike the evidence that

has been presented. Number one, I have heard no evidence whatsoever to show that Frank West was the person who collected these items and carried them off. There have been no witnesses, no single bit of evidence presented as to him taking the stuff off the premises of Mr. Cardova.

The larceny has not been shown, because he has not been shown as the active agent that did this. All this amounts to this: The mere possession of some items identified by Mr. Cardova as having been taken from his premises, and allegedly to have been taken by Mr. West to Gloucester, Virginia.

* * *

[p. 59] THE COURT: We overrule the motion, Mr. Mayo.

MR. MAYO: Please note our exception in the record.

* * *

MR. MAYO: The defense wishes to call Frank Robert West, Jr.

THE COURT: All right, he can be sworn to take the stand.

NOTE: The witness was sworn.

FRANK ROBERT WEST, JR., the defendant, called in his own behalf, first being duly sworn, testifies as follows:

[p. 60] DIRECT EXAMINATION
BY MR. MAYO:

Q Mr. West, I am going to put certain questions to you; please direct them to the jury, if you will.

Would you please state your name?

A Frank Robert West, Jr.

Q And your age, Mr. West?

A I am 47 years old.

Q Mr. West, have you previously been convicted of a felony?

A Yes, sir, I have.

Q And you have heard in full the testimony here today against you?

A Yes, sir, I have.

Q I would like you to tell the jury in your own words, if you will, please, the circumstances of the case and your explanation.

A Right. Well, I am charged with this crime of stealing this stuff, and I have not stolen anything, and I have never been tried with a charge in this County. I have never done anything in this County to break the law.

In Gloucester, which is where I lived, I did have a lot of different items in my possession in that house, but it was several other people that had items in it, too; my sister had furniture and stuff in the house, and my wife still [p. 61] had personal items in that house.

Now, I bought a lot of the merchandise from the flea bargain places and sold a lot of them in several different locations. I go from time to time to these places, just like all of you do, and a lot of times you buy things from there that are stolen. The biggest part of the time you never know it. Some of these items may have been stolen that could be in the house, because I bought the items from several guys. I have sold several truckloads of items at different places, but I have not been in this County and stole anything or broken in in [sic] any house.

Q Do you know Angelo Cardova?

A No, sir, I don't.

Q Are you familiar or do you have any knowledge of where his premises are, other than what you have heard here today?

A I don't have the slightest idea, period, where this gentleman lived.

MR. MAYO: I have no further questions at this time, Your Honor.

CROSS EXAMINATION

BY MR. FOX:

Q Mr. West, I show you a photograph marked Commonwealth's Exhibit No. 1. I would like for you to tell the jury whose items those are and where they came from.

[p. 62] A I really do not know whose items they were.

Q Are those items that you bought at a flea market?

A Well, I didn't buy these items at a flea market, no sir.

Q Whose items are they?

A They are some items that I got from a Ronnie Elkins.

Q All of the items you bought from him?

A I can't say all.

Q Which ones did you buy from him?

A I can't say, because I don't have an inventory.

Q Can you tell me the ones you bought from Ronnie Elkins?

A Yes, I am sure I can.

Q Which ones?

A I would say the platter.

Q How about the sea shell mirror?

A Yes, sir, I think so.

Q Where did you buy that?

A In Newport News at a flea market.

Q And when did you buy it?

A I would guess before January 1.

Q How long have you known Mr. Elkins?

[p. 63] A For lots of years.

Q Do you know where he is today?

A As far as I know, he is in Newport News.

Q All right. I direct your attention to Commonwealth's Exhibit 2; that is the mirror you say you bought from Ronnie Elkins in Newport News in January?

A Yes, I believe that is the same one.

Q But the other items, you are not sure who you bought those from?

A No, sir. I did not have an inventory when the Sheriff came and hauled them all away from my home.

Q I show you Commonwealth's Exhibit 3, and it shows that coffee table. Would you tell the jury how you got the coffee table?

A Well, to the best of my knowledge, I had several coffee tables.

Q How about that coffee table?

A I can't specifically say I got this from him or not.

Q You do not know who you got this from?

A I could have gotten this from him.

Q Ronnie Elkins?

A Yes, sir.

Q On the same day that you got the other [p. 64] items?

A Yes, sir, all at one time for \$500.00.

Q Ronnie Elkins is someone you have known in Newport News?

A I don't know where he lives in Newport News, but he is in Newport News.

Q I show you a photograph of the fake fur with "Esther" on the inside. Where did you get that?

A From the same man. I gave him \$5.00 for this.

Q You remember that it had "Esther" in it?

A I don't know whether it had "Esther" in it or not.

Q Is it the same coat?

A I had several coats like that.

Q You had several coats with "Esther" in it? Did you buy this coat specifically from him?

A I am pretty sure I did, because I remember the flap.

Q But you don't remember "Esther"?

A No.

Q Are you sure it is the same coat?

A I am fairly sure, but not definite.

Q I show you Commonwealth's Exhibit 6. Is this the silverware - can you identify that?

[p. 65] A Not by that photograph, no, sir.

Q Do you know whether or not that is yours?

A I can't say, because I have several sets of silverware.

Q Do you know whether or not this was in your home?

A No, I don't.

Q You don't deny that you have lived in Gloucester County, in Perrins?

A It is very possible.

Q Do you deny that you live in Gloucester County in Perrins?

A No.

Q Do you deny that Mrs. Jones lives behind you?

A No.

Q Did you tell the jury the truth on the stand?

A She doesn't know; she's not in the home.

Q I show you the picture of a mounted lobster.

A Yes.

Q Where did you get that?

A From Ronnie Elkins.

Q At the time you got the other things?

A Yes, sir.

[p. 66] Q Before January 1?

A Before January 1.

Q How long before January 1?

A I really don't know. It was before January 1.

Q You remember Ronnie Elkins; you remember a \$500.00 purchase; and you remember a \$5.00 purchase for a fake fur coat.

Tell us when you got it?

A Around January 1.

Q Around January 1; before or after?

A I would guess around January 1.

Q Tell me about Ronnie Elkins and how you happened to do business and how you happened to go there, all about the transactions.

A I can't tell you how Ronnie Elkins does business.

Q I want to know about your business transactions with Ronnie Elkins.

A I buy and sell different items from different individuals at flea markets.

Q Tell us where that market is?

A In Richmond. You have them in Gloucester.

Q Where is Ronnie Elkins' flea market?

A He does not have one.

[p. 67] Q Didn't you say you bought some items from Ronnie Elkins?

A At a flea market.

Q Tell the jury where that is at.

A In Gloucester.

Q Tell the jury about this flea market and Ronnie Elkins, some time around January 1, and these items, not the other items.

A Ronnie Elkins does not own a flea market.

Q Tell the jury, if you will, where Ronnie Elkins was on the day that you bought the items?

A I don't remember. It was before January 1.

Q Where was it?

A I bought stuff from him in Richmond, Gloucester, and Newport News.

Q Where did you buy this?

A Over in Newport News.

Q Now, I show you a picture marked Commonwealth's Exhibit 12 - excuse me, Exhibit No. 8, and ask you to identify that bar.

A Yes, I bought that bar from him.

Q At the time you bought the other things?

A Yes, but it was not put together like that.

Q Did you put it together?

A No, sir. Apparently, the Sheriff here put [p. 68] it together.

Q How about this small television with the clock on it?

A I bought several televisions from different individuals at flea markets.

Q Did you buy this one from Ronnie Elkins?

A I can't state that I know.

Q Do you know where this came from?

A No, sir, I don't.

Q I show you Commonwealth's Exhibit No. 7, showing a jacket with "Korea" on it. Do you recall where you got this?

A Yes, from Ronnie Elkins.

Q At the same time you bought the others?

A Right, everything except the television set. No, I could have bought the television set.

Q Are you familiar with this television set, Commonwealth's Exhibit No. 9?

A It looks like a television I have in my home.

Q Do you have any explanation for the jury why it had Mr. Cardova's Social Security Number on it?

A I don't know anything about a Social Security Number, but I have one like that.

Q A Sony television set; that is yours?

[p. 69] A I don't know if that is mine or not. The officials in Westmoreland County have mine.

Q Is that yours?

A I cannot say that that's mine.

Q If it is not yours, why is it in your home?

A I own a Sony color television similar to that.

Q Tell us where you bought this Sony color television set similar to that?

A I bought it in Goochland County.

Q Who did you buy it from?

A I forget the guy's name, but I can prove it.

Q Okay. Please prove it to the jury.

A I can prove it by Walter Riddle, the superintendent of the Northside State Farm.

Q Walter Riddle? Where is he today?

A He is the warden there.

Q Where is he?

A In Goochland.

Q Did you subpoena him here today?

A I didn't know I would have to.

Q Did you subpoena him to be here today?

A No sir.

Q Did you subpoena Mr. Elkins to be here today?

[p. 70] A No, sir. This is the first time I have been confronted with what I was to be charged with.

Q You are represented by counsel, are you not, Mr. West?

A Yes.

Q You have not been informed of the allegations against you?

A I have never been confronted with the items.

MR. FOX: No other questions, Your Honor.

MR. MAYO: I have no questions, Your Honor.

THE COURT: You may step down, Mr. West.

* * *

—

[p. 71] MR. MAYO: If Your Honor please, I would like to make a motion, renew my motion once again to strike the evidence. It is contrary to the law and the evidence as presented by the Commonwealth. I renew it based on the ground that I have previously given.

THE COURT: We overrule the motion, Mr. Mayo.

MR. MAYO: Please note my exception.

* * *

—

DEFENSE COUNSEL'S JURY ARGUMENT:

* * *

[p. 86] Ladies and gentlemen of the jury, there has been no direct evidence at all that said Frank Robert West, Jr., was in the house of Mr. Angelo Cardova. There has been no evidence whatsoever that he went into the house or he came out of the house. There is no direct evidence whatsoever that Frank Robert West, Jr. carried, himself, items out of the house. Remember "asportation,"

the larceny word for carrying away the goods of another? That is what he is charged with. He is not charged with possession; he is charged with being the person who took those items [p. 87] out of that house and went away with them. There is no such evidence. The Commonwealth, because they do not have that evidence and because they found these goods in Frank Robert West's house, say he must have been the one that did it. Look, he's got the stuff. There is no evidence he took the stuff. I have heard no evidence at all, direct or otherwise, setting forth that there were fingerprints in the house, that there were fingerprints in the house nor on the items in the house. I have seen no evidence nor heard any that placed Frank Robert West, Jr. in the vicinity of the Cardovas' house; at, before, or after Mr. Cardova's items were taken. We are not denying the items were taken. Mr. Cardova certainly testified to that. There is no dispute here. I believe the items that were entered here are Mr. Cardova's items that were stolen, but that does not mean Frank Robert West, Jr. did it.

* * *

[p. 92] THE COURT:

* * *

The Court has prepared the verdicts for you. One is, we, the jury, find the defendant, Frank Robert West, Jr., guilty of larceny as charged in the indictment and fix his punishment at - or, we, the jury, find the defendant,

Frank Robert West, Jr., not guilty. Of course, there are just two possible verdicts.

* * *

INSTRUCTION NO. 1

The jury are the sole judges of the credibility of the witnesses; and in determining the weight given to the testimony of the witnesses the jury may consider the appearance and demeanor of the witness on the witness stand; their manner of testifying; their apparent intelligence or lack of it; their interest or lack of it in the outcome of the case; their temper, feeling or bias, if any has been shown; their opportunity for knowing the truth and having observed the things concerning which they testify; and from these and all other surrounding circumstances at the trial, the jury are to determine which witnesses are more worthy of credit and give credit accordingly.

INSTRUCTION NO. 2

It is not necessary that material facts be proven by direct evidence; they may be proven by circumstantial evidence, that is, the jury may draw all reasonable and legitimate inferences and deductions from the evidence adduced before them.

INSTRUCTION NO. 3

Circumstantial evidence is legal and competent, and a person charged with a crime may be convicted upon

circumstantial evidence alone, or upon circumstantial evidence connected with other evidence, if the jury believe beyond a reasonable doubt from such circumstantial evidence that the person so charged is guilty; therefore, the jury have the right to convict the defendant upon circumstantial evidence alone, or upon circumstantial evidence coupled with other evidence, if from all the evidence the jury believe that guilt of the defendant has been proven beyond a reasonable doubt.

INSTRUCTION NO. 4

The defendant is presumed to be innocent of the offense with which he is charged and this presumption of innocence goes with him through the entire case and applies at every stage thereof and is sufficient to require you to find the defendant not guilty unless and until the Commonwealth upon whom the burden rests, proves his guilt beyond a reasonable doubt, and the Court further tells you that it is not sufficient that facts and circumstances proved be consistent with the guilt of the defendant, but they must be inconsistent with every reasonable hypothesis consistent with the innocence of the defendant.

INSTRUCTION NO. 6

If you believe from the evidence beyond a reasonable doubt that the defendant took and carried away any of the property of Angelo F. Cordova, as charged in the indictment, and of a value of \$100.00 or more, against Angelo F. Cordova's will and without his consent, and with the felonious intent to permanently deprive him of

his ownership thereof, then you shall find the defendant guilty of grand larceny and fix his punishment at confinement in the penitentiary not less than one nor more than twenty years, or by confinement in jail not exceeding twelve months or by a fine not exceeding one thousand dollars, either or both.

INSTRUCTION NO. 7

If you belief from the evidence beyond a reasonable doubt that property of a value of \$100.00 or more was stolen from Angelo F. Cordova, and that it was recently thereafter found in the exclusive and personal possession of the defendant, and that such possession has been unexplained or falsely denied by the defendant, then such possession is sufficient to raise an inference that the defendant was the thief; and if such inference, taking into consideration the whole evidence, leads you to believe beyond a reasonable doubt that the defendant committed the theft, then you shall find the defendant guilty.

INSTRUCTION NO. 11

The burden is upon the Commonwealth to prove by the evidence beyond a reasonable doubt every material and necessary element of the offense charged against the defendant. It is not sufficient that the jury may believe his guilt probable, or more probable than his innocence. Suspicion or probability of guilt, however strong, will not authorize a conviction, but the evidence must prove his guilt beyond a reasonable doubt. The jury shall not speculate or go outside of the evidence to consider what they think might have taken place, but you are to confine your

consideration to the evidence introduced by the Commonwealth and the defense and unless you believe, upon a consideration of all the evidence before you, that guilt of the defendant has been proved beyond a reasonable doubt as to every material and necessary element of the offense charged against him then you shall find the defendant not guilty.

INSTRUCTION NO. 12

Where the Commonwealth undertakes to prove the guilt of the defendant by circumstantial evidence, it must not only prove the circumstances relied upon, but it must overcome the presumption of innocence of the defendant and establish his guilt beyond a reasonable doubt. All necessary circumstances proved must be consistent with guilt and inconsistent with innocence. It is not sufficient that the circumstances proved create a suspicion of guilt, however strong, or even a probability of guilt, but they must exclude every reasonable hypothesis except that of guilt. The chain of circumstances must be unbroken and the evidence as a whole must be sufficient to satisfy the jury that guilt of the defendant has been proven to the exclusion of any other reasonable hypothesis.

INSTRUCTION NO. 13

When the Commonwealth relies upon circumstantial evidence in order to secure a conviction, it is the duty of the jury to scan such evidence with great care and caution; and unless the circumstances proven are of such a character and tendency as to produce in the mind of the jury a moral conviction of guilt of the defendant beyond a

reasonable doubt, then you must find the defendant not guilty.

* * *

[p. 93] THE CLERK: Members of the jury, have you agreed upon a verdict?

THE FOREMAN: Yes, we have.

THE CLERK: We, the jury, find the defendant Frank Robert West, Jr., guilty of grand larceny as charged in the indictment, and fix his punishment at ten years in prison; signed L. S. Cooke, Jr., Foreman.

* * *

[p. 95] MR. MAYO: Yes, Your Honor. We wish to present two motions to the Court. We wish to renew our motion to strike the evidence as being contrary to the verdict - to set aside the verdict as being contrary to the law and the evidence, and we move to set aside the verdict.

THE COURT: We will overrule that motion.

* * *

IN THE
SUPREME COURT OF VIRGINIA
AT RICHMOND

FRANK ROBERT WEST, JR.

Appellant

v.

THE COMMONWEALTH OF VIRGINIA

Appellee

PETITION FOR APPEAL

To the Honorable Chief Justice and Associate Justice of the Supreme Court of Virginia:

The Petitioner, Frank Robert West, Jr., respectfully represents that he is aggrieved by a final order entered June 21, 1979, by the Circuit Court of Westmoreland County, Virginia, wherein the Appellant was the Defendant and the Appellee was the Plaintiff.

* * *

STATEMENT OF MATERIAL PROCEEDINGS
IN TRIAL COURT

On June 21, 1979, the Defendant, Frank Robert West, Jr., was tried before a jury in the Circuit Court of Westmoreland County, Virginia, the Honorable Dixon L. Foster, presiding, and was found guilty of having taken,

stolen and carried away the property of Angelo F. Cordova having a value of \$100.00 or more, in violation of Section 18.1-95 of the Code of Virginia of 1950, as amended; and was subsequently sentenced to 10 years in the State Penitentiary.

ASSIGNMENTS OF ERROR

The Circuit Court of Westmoreland County erred in the following particulars:

* * *

4. The Court erred in denying Defendant's motion to strike the prosecution's evidence at the close of Defendant's case because the evidence presented at the trial of the Defendant was not sufficient at law to convict him of the offense alleged in the indictment.

5. The Court erred in refusing to set aside the jury verdict because the Commonwealth did not carry the burden of proving the guilt of the Defendant beyond a reasonable doubt.

STATEMENT OF THE QUESTIONS PRESENTED

* * *

C. Did the trial court err in denying Defendant's motions to strike the evidence (Assignment of Error #4)

D. Did the trial court err in refusing to set aside the jury verdict? (Assignment of Error #5)

* * *

C. The trial court erred in denying defendant's motion to strike the evidence following the presentation of defendant's case.

The law in Virginia is clear that the recent and exclusive possession of stolen property will warrant a conviction of larceny unless the defendant affords a reasonable account of his possessions.¹¹ In the instant case the defendant claimed as his own the property found in his home and identified as the stolen property by the complaining witness. As an explanation of his ownership the defendant explained that he had purchased most of the items from a man named Ronnie Elkins who buys and sells frequently at flea markets generally in Richmond and Norfolk area. The case of the Commonwealth offered no evidence, physical or scientific, tying the accused to any alleged break-in. The only circumstantial evidence offered to establish a case was the finding in Frank West's home of less than $\frac{1}{3}$ of the items missing from Mr. Cordova's home and the defendant gave a reasonable explanation for his possession of those. Without the inference of guilt upon which the Commonwealth's entire case was based, but which was effectively rebutted by the defendant, there was not sufficient evidence to allow the jury to decide and the trial court erred in failing to grant defendant's motion to strike the evidence.

D. The trial court erred in refusing to set aside the jury verdict as being contrary to the law and the evidence.

The defendant is presumed to be innocent of the offense with which he is charged until such time as the

¹¹ *Stallard v. Commonwealth*, 130 Va. 769, 107 S.E. 722 (1921)

Commonwealth shall prove his guilt beyond a reasonable doubt.¹² In this case the evidence shows that after a two week period of absence, Mr. Cordova returned to his vacation home to find goods valued at \$3,000 missing from that home. There is not one shred of evidence which places the defendant anywhere near the scene of the alleged crime. The Commonwealth then proceeds to show that some three weeks later approximately 1/3 of these goods are found in the home of Frank West. Assuming the Commonwealth satisfactorily showed that those goods were in the exclusive and personal possession of the defendant, an inference of guilt is created only if that possession remains unexplained or falsely denied.¹³ In this case the defendant did explain the possession of the goods in question so even the inference of guilt which the Commonwealth may have established was rebutted. Because there was no other evidence at all to connect the defendant to the crime, we suggest that a rebutted inference of guilt is not sufficient to meet the standard of proof required of the Commonwealth, that a reasonable doubt must certainly exist and that the trial court erred in not granting the motion to set aside the verdict as being contrary to the law and the evidence.

* * * *

¹² *Moore v. Commonwealth*, 202 Va. 667 at 670, 119 S.E.2d 324 at 327 (1961)

¹³ *Font v. Commonwealth*, 199 Va. 184 at 193-194, 98 S.E.2d 817 at 824 (1957)

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 30th day of May, 1980.

Frank Robert West, Jr.,
against Record No. 791541
Circuit Court No. 185

Commonwealth of Virginia, Appellee.

From the Circuit Court of Westmoreland County

Finding no reversible error in the judgment complained of, the court refuses the petition for appeal filed in the above-styled case.

The said circuit court shall allow court-appointed counsel the fee set forth below and also his necessary direct out-of-pocket expenses. And it is ordered that the Commonwealth recover of the appellant the costs in this court and in the court below.

A Copy,

Teste:

Allen L. Lucy, Clerk

By:

Deputy Clerk

VIRGINIA:

IN THE SUPREME COURT OF VIRGINIA
FRANK ROBERT WEST, JR., # 64608

Full name and prison number
(if any) of Petitioner

v.

Case No. _____
(To be supplied by the
Clerk of the Court) Clerk
Supreme Court of Virginia

WARDEN

RECEIVED

Name and Title of Respondent

MAY 19 1987

PETITION FOR WRIT OF HABEAS CORPUS

* * *

D. Present Petition

14. State the grounds which make your detention unlawful, including the facts on which you intend to rely:

The Circuit Court of Westmoreland County erred in the following particulars:

* * *

4. The court erred in denying Defendant's motion to strike the prosecutions evidence at the close of defendant's case because the evidence presented at the trial of the defendant was not sufficient at law to convict him of the offense alleged in the indictment.

5. The court erred in refusing to set aside the jury verdict because the Commonwealth did not carry the burden

of proving the guilt of the Defendant beyond a reasonable doubt.

* * *

STATE OF VIRGINIA,
County of Westmoreland, to-wit:

Michael C. Mayo, (hereafter Counsel), being duly sworn, deposes and says.

1. That I am an Attorney at Law having been admitted to practice law in the State of Virginia on 21 September 1973; that I am a member of the Virginia State Bar, the Virginia Bar Association, and the American Bar Association; that I am and have been a member of the Criminal Law Section of the Virginia State Bar and that I am a member of the Virginia Trial Lawyers Association; that a substantial part of my practice has been criminal defense litigation.

2. That I was appointed by the Judge of the Circuit Court of Westmoreland County to represent Frank Robert West, Jr. on indictments of Breaking and Entering and Grand Larceny handed down against him in said County at the January 1979 term; that I spent in excess of 236 hours of time in representing Mr. West on said charges and that I traveled over 2,151 miles interviewing witnesses pertaining to this case.

3. That an investigation of this case led Counsel to file Pre-trial Motions to suppress evidence recovered in searches made by law enforcement officers; that said Pre-trial Motions were heard on 15 June 1979, and that several witnesses were subpoenaed to the hearing by Counsel at the request of Frank Robert West, Jr.; that on 15 June 1979, Defense Counsel requested of his client, Frank Robert West, Jr., as Counsel had in the past, if he desired any witnesses be summoned for his Westmoreland County trial date on 21 June 1979, and Mr. West said he

had no witnesses he wished summoned; that again on 18 June 1979, Counsel inquired of Mr. West in his presence if he had any witnesses he wished subpoenaed for his trial on 21 June 1979, and Mr. West reconfirmed what he said on 15 June 1979, that he had no witnesses he wanted called; that at a meeting with Mr. West on 18 June 1979 he indicated he would take the stand in his own defense but would not tell his Counsel what the details of his testimony would be; Counsel was directed to "put him on the stand and he (Mr. West) would do the rest".

4. That on 19 June 1979, Counsel talked with Frank Robert West, Jr., by phone, to advise that the Commonwealth would only proceed with one (1) breaking and entering count at trial on 21 June 1979, and that the count alleging grand larceny would be *nolle prosequi*; that at this time and for the first time Mr. West requested Counsel get an Order from the Court to have Mr. Landon Gentry (then an inmate and witness for Mr. West in a trial in Northumberland County, Virginia, scheduled for 20 June 1979) subpoenaed as a witness for Mr. West's trial in Westmoreland County, scheduled for 21 June 1979; Counsel did so; Landon Gentry's name had never been mentioned before as a potential witness for the Westmoreland County trial.

5. That a jury trial in Westmoreland County was conducted on 21 June 1979, at which Frank Robert West, Jr. testified on his own behalf and for the first time presented a defense which involved Ronnie Elkins. No other person testified on behalf of the defense.

6. That five (5) months after trial Counsel received a letter from Frank Robert West, Jr. dated 18 November

1979, wherein he states, "his family has located Ronnie Elkins for him and they are trying to get a statement from Elkins." Mr. West asked "what (Counsel) could do with the statement in his case" (see attached letter marked Exhibit 1); that Counsel responded by letter dated 4 December 1979, wherein Counsel told West Counsel would like to interview Mr. Elkins as soon as possible before Counsel could advise Mr. West of any future use of any statement he may make. (See attached letter marked Exhibit 2.)

7. That by letter dated 19 February 1987 Frank Robert West, Jr. requested my services in assisting him regarding an anticipated affidavit from Ronnie Elkins and that I replied to his request by letter dated 27 February, which letters are attached and marked Exhibits 3 and 4 respectively.

8. That the first time Counsel heard of Ronnie Elkins was when Mr. West testified at trial on 21 June 1979; that Counsel did not know of such person before the trial date, and, therefore, Counsel could not investigate what he did not know about.

Respectfully submitted,

/s/ Michael C. Mayo
Michael C. Mayo

SUBSCRIBED AND SWORN to before me in my jurisdiction aforesaid this 13 day of July, 1987, by Michael C. Mayo.

GIVEN under my hand and notarial seal.

My commission expires: 6-9-91.

/s/ Mary C Beach
Notary Public

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 13th day of May, 1988.

Frank Robert West, Jr., No. 64608, Petitioner,
 against Record No. 870616
 Warden of the Brunswick
 Correctional Center, Respondent.

Upon a Petition for a Writ of Habeas Corpus

The Court has considered the petition of Frank Robert West, Jr. for a writ of habeas corpus ad subjiciendum and the motion to dismiss filed in answer to a rule to show cause entered herein on June 15, 1987 and the petitioner's traverse thereto. Applying the rule in *Slayton v. Parrigan*, 215 Va. 27, 205 S.E.2d 680 (1974), to petitioner's allegation 6; the rule in *Hawks v. Cox*, 211 Va. 91, 175 S.E.2d 271 (1970), to petitioner's allegations 1, 2, 3, 4 and 5; the rule in *Penn v. Smyth*, 188 Va. 367, 49 S.E.2d 600 (1948), to petitioner's allegation e and "grouns [sic] three a and b"; and finding no merit in the other complaint raised by petitioner, the Court is of opinion that the writ of habeas corpus should not issue as prayed for. It is therefore ordered that the said petition be dismissed, the rule discharged and that the respondent recover of the

petitioner his costs by him expended about his defense herein.

A Copy,

Teste:

David B. Beach, Clerk
 By: /s/ Debra A. R. Clem
 Deputy Clerk

FORM FOR USE IN APPLICATIONS
FOR HABEAS CORPUS UNDER 28 U.S.C. SECTION 2254
(Filed June 21, 1988)

FRANK ROBERT WEST, JR.

Name

Virginia state identification number: 64608

Prison Number

BRUNSWICK CORRECTIONAL CENTER, ROUTE
ONE, BOX 207-C, LAWRENCEVILLE, VA 23868

Place of Confinement

United States District Court EASTERN District of VIR-
GINIA

Case No. 88-0412-R

(To be supplied by Clerk of U.S. District Court)

FRANK ROBERT WEST, JR., PETITIONER

(Full Name) (Include name under which you were con-
victed)

v.

ELLIS B. WRIGHT, JR., WARDEN OF THE
BRUNSWICK PRISON, RESPONDENT

(Name of Warden, Superintendent, Jailor, or authorized
person having custody of petitioner)

and

THE ATTORNEY GENERAL OF THE STATE OF VIR-
GINIA, MARY SUE TERRY

* * *

IN DENYING DEFENDANT'S MOTION TO STRIKE THE
PROSECUTION'S EVIDENCE AT THE CLOSE OF THE

DEFENDANT'S CASE BECAUSE THE SAID EVIDENCE
WAS NOT SUFFICIENT AT LAW TO CONVICT THE
DEFENDANT OF THE OFFENSE ALLED [sic] IN THE
INDICTMENT: TRIAL COURT ERRED IN REFUSING TO
SET ASIDE THE JURY VERDICT BECAUSE THE COM-
MONWEALTH DID NOT CARRY THE BURDEN OF
PROVING THE GUILT OF THE DEFENDANT BEYOND
A REASONABLE DOUBT.

* * *

D. Ground four: THE CIRCUIT COURT OF WEST-
MORELAND COUNTY ERRED IN THE FOLLOW-
ING PARTICULARS:

Supporting FACTS (tell your story *briefly* without citing
cases or law): THE COURT ERRED IN DENYING
DEFENDANT'S MOTION TO STRIKE THE PROSECU-
TION EVIDENCE AT THE CLOSE OF DEFENDANT'S
CASE BECAUSE THE EVIDENCE PRESENTED AT
THE TRIAL OF THE DEFENDANT WAS NOT SUFFI-
ICIENT AT LAW TO CONVICT HIM OF THE OFFENSE
ALLEGED IN THE INDICTMENT.

* * *

E. Ground Five: THE CIRCUIT COURT OF WEST-
MORELAND COUNTRY ERRED IN THE FOLLOW-
ING PARTICULARS:

SUPPORTING FACTS: THE COURT ERRED IN
REFUSING TO SET ASIDE THE JURY VERDICT
BECAUSE THE COMMONWEALTH DID NOT
CARRY THE BURDEN OF PROVING THE GUILT OF
THE DEFENDANT BEYOND A REASONABLE
DOUBT.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

FRANK ROBERT WEST, JR.,
Petitioner,

v.

ELLIS B. WRIGHT, JR.,
WARDEN, ET AL.,

Respondents.

CIVIL ACTION
NO. 88-0412-R

(Filed Aug. 4, 1988)

BRIEF IN SUPPORT OF MOTION TO DISMISS

Comes now the respondents, by counsel, and submit the following brief in support of the motion to dismiss:

* * *

5. Grounds 1(d)-1(e) challenge the sufficiency of the evidence to support West's conviction. He alleges that the trial court erred by denying his motion to strike the prosecution's evidence, and his motion to set aside the verdict.

Although the petitioner's claim concerning sufficiency of the evidence is cognizable and may be considered on the merits by this Court, he is not entitled to federal habeas corpus relief unless this Court finds that upon the record and evidence adduced at trial, "no rational trier of fact could have found proof of guilt beyond a reasonable doubt." *See Jackson v. Virginia*, 443 U.S. 307, 324 (1979). The Supreme Court has espoused the limited nature of this review.

[T]his inquiry does not require a court to 'ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt'. . . . Once a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review *all of the evidence* is to be considered in the light most favorable to the Commonwealth.

Jackson, 443 U.S. at 319 (citations omitted) (emphasis in original). A review of the evidence in this case, in the light most favorable to the Commonwealth, clearly reveals that a rational trier of fact could have found the petitioner guilty beyond a reasonable doubt of stealing and carrying away the property of another, valued over one hundred dollars. *See Jackson*, 443 U.S. 307.

The victim, Angelo Cardova testified that he owned a home in Westmoreland County. He left his Westmoreland residence on December 13, 1979 and returned on December 26, 1979. When Cardova returned he found that the house had been broken into and certain "personal belongings, . . . the office table, the bar, the mirror and several other items" were missing. (Tr. 24-25). The items stolen from the Cardova residence were valued at \$3,500. (Tr. 26). Cardova identified as his belongings \$1,100 worth of items recovered from West's residence. (Tr. 27-33, 56). The items had been recovered as the result of a search conducted on January 10, 1980. (Tr. 36, 56). West was in possession of the recently stolen goods, and under Virginia law was guilty of larceny. *See Montgomery v. Commonwealth*, 221 Va. 188, 269 S.E.2d 352 (1980); *Fount v. Commonwealth*, 199 Va. 184, 190, 98 S.E.2d 817, 821-822 (1957); *see also Best v. Commonwealth*, 222 Va. 387, 282

S.E.2d 16 (1981); *Drinkard v. Commonwealth*, 163 Va. 1074, 1083, 178 S.E.2d 25, 28 (1935).

The evidence adduced at trial survives the requisite standard of review by this Court concerning the specific challenges by the petitioner. A rational finder of fact could have found that West stole the property belonging to the Cardovas. Therefore, the petitioner's claim of insufficient evidence to support his convictions is without merit and should be dismissed.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

FRANK ROBERT WEST, JR.,

Petitioner

against

ELLIS B. WRIGHT, JR.,
WARDEN, OF THE
BRUNSWICK CORRECTIONAL
CENTER,

CIVIL ACTION
NO. 88-0412-R

(Filed Sep. 21, 1988)

Respondents.

TRAVERSE TO MOTION TO DISMISS AND MEMORANDUM OF LAW IN SUPPORT OF TRAVERSE

Comes Now the petitioner, pro se, and does motion that this honorable court deny the respondents' motion to dismiss and further grant the petitioner such relief as he is entitled, entering judgment for the petitioner as the petitioner is entitled to review, reversal in part, remanding in part, and a final judgment in his favor. The following laws and authorities will better explain [sic] the petitioner's allegations:

* * *

5. As to allegations in challenge of the sufficiency of evidence to support the petitioner's conviction, the petitioner would be brief herein and recommend that the court see the petition for appeal and writ of habeas corpus traverse to motion to dismiss for arguments in support of the allegation(s).

The law in Virginia is clear that the recent and exclusive possession of stolen property will warrant a conviction of larceny unless the defendant affords a reasonable account of his possessions. In the case herein the petitioner would now incorporate the allegation of new evidence within this ground in answer thereof.

In the instant case the petitioner in explanation [sic] of his ownership explained that he had pursued with his attorney the matter of the fact that he had indeed bought most of the objects from Ronnie Elkins. This has stemmed [sic] the argument from the respondent's that West failed to raise the issue of Elkins with his counsel prior to the trial, which would have the petitioner further incorporate the allegation of counsel's ineffectiveness as to Ronnie Elkins [sic] investigation and objections. There is no way that the allegation's conglomerated herein can be separated and answered in a like manner. None are conclusory and none are frivolous. The petitioner explained [sic] in the transcript that he had purchased items from Ronnie Elkins. Raising the issue at trial allows it to be entered herein, further when asked why he did not have Elkins subpoenaed for the trial, the petitioner answered that he had not been confronted with the items until the trial itself. Noone [sic] contradicted this testimony, as noone [sic] informed West of what the items were and he did not see an- [sic] of them until the trial itself, this left him no time prior to the trial to subpoena Elkins.

* * *

FILED: August 2, 1990
 UNITED STATES COURT OF APPEALS
 FOR THE FOURTH CIRCUIT

No. 89-6686

FRANK ROBERT WEST, JR.,

Petitioner-Appellant,

versus

ELLIS B. WRIGHT, JR., Warden; MARY SUE TERRY,
 Attorney General of Virginia,

Respondents-Appellees.

ORDER

For reasons appearing to the Court;

IT IS ORDERED that the parties shall file supplemental memoranda, not exceeding 15 pages in length, addressing the following questions. The first question is directed to appellant only:

1. Does West now contend that the use of the inference of larceny arising from recent possession of stolen goods is itself unconstitutional or rather that, even allowing use of the inference, the conviction was unconstitutional because not supported by sufficient evidence?

2. If West contends that the use of the inference is itself unconstitutional, was this claim presented to the Virginia courts as a claim

distinct from the general assertion that the evidence was insufficient to convict? (If so, please include citations to the joint appendix or record to support that response.)

3. If the answer to question 2 was yes, would a ruling by this court that the use of the inference was itself unconstitutional be a "new rule" under *Teague v. Lane*, 109 S. Ct. 1060 (1989); *Penry v. Lynaugh*, 109 S. Ct. 2934 (1989); *Butler v. McKellar*, 110 S. Ct. 1212 (1990); and *Saffle v. Parks*, 110 S. Ct. 1257 (1990)?

The appellant shall serve and file his memorandum on or before August 17, 1990, in the Office of the Clerk and appellees shall serve and file their supplemental memorandum within 10 days after service of appellant's memorandum.

Entered at the direction of Judge Phillips for a panel consisting of Chief Judge Ervin, Judge Phillips and Judge Murnaghan.

For the Court
JOHN M. GREACEN
 Clerk

* * *

* * *

**APPELLANT'S MEMORANDUM IN RESPONSE TO
 COURT'S ORDER OF AUGUST 6, 1990**

ARGUMENT

I. Does West now contend that the use of the inference of larceny arising from recent possession of stolen goods is itself unconstitutional or rather that, even allowing use of the inference, the conviction was unconstitutional because not supported by sufficient evidence?

West contends that he is raising both a claim that the "use of the inference of larceny arising from recent possession of stolen goods is itself unconstitutional" and that "even allowing use of the inference, the conviction was unconstitutional because not supported by sufficient evidence." West challenges, however, the use of the inference in this case. He does not claim that the inference, standing alone, may *never* prove guilt for larceny beyond a reasonable doubt.

It is true that West did not make a specific constitutional challenge to the use of the inference instruction itself and that such an objection can be made at trial. *County Court of Ulster v. Allen*, 442 U.S. 140, 165 (1979) (inference's validity as an instruction determined under the "more likely than not" standard).¹

¹ *Ulster* suggests that the inference could properly be given while the evidence as a whole would not prove guilt: the opinion closes by noting that "[t]he permissive presumption, as used in this case, satisfied the [more likely than not test]. And, as already noted, the New York Court of Appeals has concluded that the record as a whole was sufficient to establish guilt beyond a reasonable doubt." 442 U.S. at 167.

West's failure to make a specific *Ulster* objection is not significant and is not tantamount to a concession that the inference necessarily has some probative value here. When, as is the case here, the inference to be drawn from possession is the only proof of guilt, the line between an *Ulster* analysis of the validity of the inference instruction and a *Jackson* analysis that the inference does not prove guilt is, for practical purposes, non-existent. The Eleventh Circuit noted this in a case where a *Jackson* issue was raised but no objection to the instruction was made under *Ulster*:

The preceding discussion of *Ulster* illustrates that, although the validity of a permissive inference instruction and the sufficiency of the evidence in theory are distinct issues, in practice, where the primary evidence of guilt is the same as the evidence that gives rise to a permissive inference instruction, it is difficult to separate an *Ulster* analysis from a *Jackson v. Virginia* analysis.) (emphasis added).

Cosby v. Jones, 682 F.2d 1373, 1377 (11th Cir. 1982).

* * *

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 89-6686

FRANK ROBERT WEST, Jr.,
Appellant,
v.

ELLIS B. WRIGHT, Jr., WARDEN AND
MARY SUE TERRY, ATTORNEY GENERAL
OF VIRGINIA,

Appellees.

SUPPLEMENTAL MEMORANDUM FOR APPELLEES

* * *

West's assertion that, if accepted, his claim would not constitute a "new rule" because his conviction became final after *Jackson v. Virginia* was decided (West Memo at 5) is a *non-sequitur*. The questions posed by the Court correctly recognize that a *Jackson* sufficiency claim is entirely separate and distinct from a claim that Virginia's use of the permissive inference is "itself unconstitutional." The Commonwealth has never contended that *Jackson v. Virginia* is inapplicable to defendant's sufficiency claim. Nothing in *Jackson*, however, either "compelled" or "dictated" that Virginia's use of the permissive inference of guilt is "itself unconstitutional." And *Cosby v.*

Jones, the Eleventh Circuit case upon which West primarily relies, was not decided until two years after West's conviction became final.

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